

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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111
METRO-GOLDWYN-MAYER, INC.
and
STAN GETZ

Appellants

v.

CHARLIE BYRD

Appellee

APPEAL FROM JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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Statement of Questions Presented

1. May appellee, a union musician, who was employed to make a record as a co-featured artist with another union musician and who was paid in full for his services in accordance with the scale of wages provided in a collective bargaining agreement, ever, as a matter of law, recover additional compensation in the form of royalties either from the recording company or from his co-featured artist on the theory of contract implied-in-fact or quasi-contract when he has no express agreement therefor but his co-featured artist did have an express contract for such royalties? If so, did appellee in this case present any sufficient evidence to go to the jury on such a theory of implied-in-fact contract or quasi-contract, especially when his own evidence showed that he never discussed with his co-featured artist the terms of his royalty contract and he conducted himself in a manner inconsistent with the usual and standard terms of contracts under which royalties are paid for recordings?

2. Are appellants entitled to a new trial for errors of the trial court, particularly the refusal to admit into evidence the collective bargaining agreement which defined the pre-existing legal relationships between appellants and appellee and the express contract between the two appellants the proceeds of which appellee seeks to share?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21370

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and
STAN GETZ

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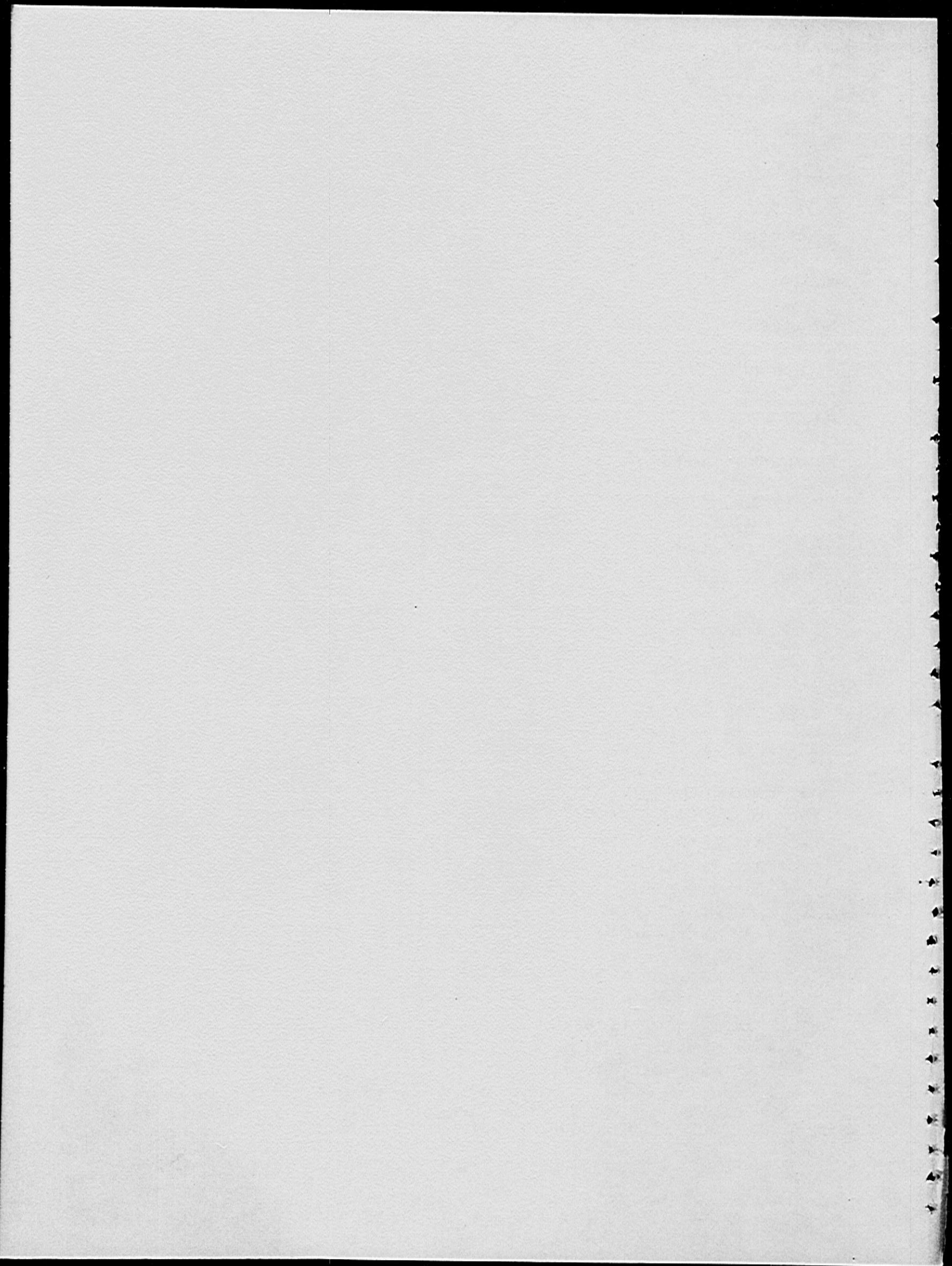
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Appellee

APPEAL FROM JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS



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Jurisdictional Statement

This is a suit by appellee plaintiff below originating in the United States District Court for the District of Columbia for royalties claimed to be due from appellants on a theory of contract implied-in-fact or quasi-contract. Jurisdiction was based upon the amount claimed exceeding \$10,000. (Par. 1, Amended Complaint, JA 3.)^{1/} The case is before this Court on appeal from a verdict and judgment against appellant Metro-Goldwyn-Mayer, Inc. in the amount of \$59,801.58 and against appellant Stanley Getz in the amount of \$29,849.68. Appellants seek reversal of the judgment below upon their motion for a directed verdict at the close of plaintiff's evidence (JA 240) renewed at the close of all of the evidence (JA 260) and their motion for judgment notwithstanding the verdict (JA 40-44). In the alternative appellants seek a new trial because of errors in the trial as set forth in their alternative motion below for a new trial (JA 40-44). These motions were denied by the trial court on August 28, 1967 (JA 47). Notice of appeal was filed on September 22, 1967 (JA 48). The record

^{1/} "JA" references are to consecutively numbered pages of the separately bound Joint Appendix.

on appeal was filed and docketed in this Court on October 30, 1967. A supplemental record was filed and docketed on November 11, 1967. Jurisdiction of this appeal in this Court is based upon 28 U.S.C. Section 1291 and Rule 73 of the Federal Rules of Civil Procedure.

Statement of the Case

There is little dispute about the basic facts involved in this case. The dispute is based upon what inferences may be drawn from those basic facts and whether there was sufficient evidence to submit plaintiff's claim to the jury.

The undisputed evidence establishes the following: ^{2/}

Charlie Byrd, the appellee herein, and Stan Getz, one of the appellants, are musicians. While on a trip to South America sponsored by the State Department, Byrd became acquainted with Brazilian music known as the Bossa Nova which is a variation of the Samba. (JA 24, 26.) In the early fall of 1961, Byrd met Stan Getz at a club where he was playing a musical engagement, invited him to his home and

^{2/} Appellants' motion for summary judgment included a Statement of Material Facts as to Which There is no Genuine Issue which, under Rule 9(h) of the Rules of the United States District Court for the District of Columbia, must be assumed to be true in the absence of appellee's objection to the facts. (JA 14-18.) These facts are also established by the evidence presented at the trial.

proposed that they join in making a record of some of this Brazilian music. (JA 136-138.) Byrd knew that Getz was under contract to appellant Metro-Goldwyn-Mayer, Inc. (hereinafter referred to as MGM). Byrd did not, however, know the terms of Getz' contract and did not discuss them with Getz. Getz agreed to talk to MGM about making the proposed record, and shortly thereafter did discuss the matter with Creed Taylor, head of the Verve Record Division of MGM who thereupon called Charlie Byrd. (JA 139.)

After discussions which were limited to the technical matters of the recording, a recording session was held at the Van Gelder studio in Englewood Cliffs, New Jersey, in an attempt to make the proposed recording. (JA 140-141.) All parties agreed that the performance was unsatisfactory from a musical point of view and no record was ever produced as a result of this recording session. (JA 143.)

Thereafter a second recording session was held on February 13, 1962 at All Souls Church, Washington, D. C. (JA 146.) As a result of the musical performance at this second recording session, the record album "Jazz Samba" was produced. One of the musical numbers included in the album is "Desafinado". An edited version of this number was produced and sold as one side of a single record. (JA 150.)

In accordance with the understanding of all parties, Byrd was co-featured with Getz in the promotion and sale of the album and single record. His name appears with that of Getz on the folder cover enclosing the album and on the label of the record itself. The single record includes the names Stan Getz and Charlie Byrd as the artists who produced the music for "Desafinado". This is only one side of the single record, however. The other side is "Theme from Dr. Kildare" which is not taken from the "Jazz Samba" album. Charlie Byrd did not participate in playing the music on this side of the single record and only the name of Stan Getz appears. (Pltf's Ex. No. 3 & 4, JA 51-56.)

Although it was fully understood by all parties that the names of Getz and Byrd would be co-featured in the promotion and sale of the album there was no evidence offered of any express understanding between the parties that MGM would pay any royalties to Byrd or that Getz would share with Byrd any royalties due Getz. (JA 153.)

Appellee agrees that his claim is not based upon any express agreement but is based upon a contract implied-in-fact or quasi-contract.

(Amended Complaint, par. 9, 10, JA 4. Pretrial proceedings, JA 27.)

Byrd and Getz are members of the American Federation of Musicians (Pltf's Ex. 2, JA 50) which was a party to a collective

bargaining agreement with MGM known as the Phonograph Record Labor Agreement of January 1959. (Pretrial proceedings, JA 26.) A contract on American Federation of Musicians Form B-4 was executed with respect to each of the recording sessions in October 1961 and February 1962 referred to above. (Pltf's Ex. 1 and 2, JA 49-50.) These contract forms recite the time and place of the performances, the time of each session, the names of the musicians and the compensation due to each musician at union scale together with the pension compensation due the union for each musician. Charlie Byrd's compensation at double union scale as leader is set forth on each of these B-4 contracts and was paid to him. (Pltf's Ex. No. 1, JA 49, JA 152.)

The American Federation of Musicians Phonograph Record Labor Agreement, (Defts' Ex. 1 for identification, JA 59-87) fixing the foregoing union scale of wages and containing other provisions considered material to this case was offered in evidence by defendants but was objected to and was excluded by the trial court. (JA 183-185.) Paragraph 13 of the Phonograph Record Labor Agreement provides as follows (JA 66):

"13. The following provision shall be included in, and whether or not so included, shall be deemed part of all contracts calling for recording services between the Company and persons covered by this agreement:

'This contract shall not become effective unless and until it shall be approved by the International Executive Board of the American Federation of Musicians of the United States and Canada, or by a duly authorized agent thereof. ''"

Byrd had no express agreement for the payment of any royalties to him for his services in making the Jazz Samba recording and offered no evidence of submitting any agreement to the Union for approval.

Royalties may be paid to musicians in addition to the union scale provided by the Phonograph Record Labor Agreement by separate contract negotiated with the recording companies. The terms of royalty contracts are generally agreed upon in advance of the recording sessions. (JA 197.) Such contracts are usually five or six pages in length. (JA 197.) MGM has never paid royalties to a musician without an express written contract. (JA 210.) Royalty contracts have certain standard provisions in addition to providing for the payment of royalties to the musician based on sales of records. The going rate of royalties may be anywhere from 5% to 10%. (JA 108) The normal rate is 5% (JA 122). It is a usual provision of a royalty contract that the artist will perform exclusively for the recording company for a specified period. There may be an option in the company alone to renew the contract for a specified period. (JA 160.) Such a contract ordinarily may provide for deducting the cost of

musicians and the cost of the recording from the royalties. (JA 162.) It is a standard provision of royalty contracts that the artist will not play the same musical composition for any other recording company for five years after termination of the contract. (JA 164.) It is a common provision of an artist's royalty contract that the artist make a stated minimum number of recordings each year. The number is a subject of negotiation. (JA 165.)

During all the period of discussions between Byrd, Getz and MGM with respect to the making of the record here in issue, Byrd never made any request for an artist's royalty contract, never requested the payment of royalties to him, and never discussed any of the foregoing terms which are standard or usual provisions of a royalty contract. After making Jazz Samba in February 1962, Byrd felt free to play the same music for another recording company.

(JA 164.) During this same period he was negotiating an exclusive artist's contract with another company, Riverside, and had, in fact, agreed to sign with Riverside as soon as Jazz Samba was made.

(JA 126, 127.)

Subsequent to the making of Jazz Samba, Byrd still did not request the payment of any royalties to him by MGM. He had a discussion with Creed Taylor of MGM subsequent to the time Jazz

Samba was an assured success. In that conversation the parties recognized that Byrd was not receiving royalties. (JA 154, 155, 167.) Taylor said he was sorry Byrd was not receiving royalties. (JA 154.) He said something to the effect that Byrd had got the "short end of the stick." (JA 154, 207.) Byrd testified that he and Taylor "agreed" that the arrangements had "all been laxly put together because no one expected it to be quite the success that it was." (JA 155.) During all of these discussions Byrd made no claim for royalties from the sales of Jazz Samba or the single record Desafinado. (JA 203.) To make up for the absence of provision for royalties to Byrd from the Jazz Samba recording, Taylor offered to Byrd the opportunity to make a sequel on which there would be a formal royalty contract. (JA 155, 202, 207.) This sequel was not made because by that time Byrd had signed an exclusive artist's contract with Riverside. (JA 166.) There were conversations seeking a reciprocal arrangement for release of artists from their exclusive agreements with Riverside and MGM but nothing was worked out. (JA 125, 166, 206.)

At the time the making of Jazz Samba was being discussed by the parties, Byrd knew Getz was recording for MGM and assumed that Getz had an exclusive artist's contract with MGM. (JA 159.)

Byrd did not, however, discuss this contract with Getz or Creed Taylor and was not familiar with its terms. (JA 159, 162, 196.) Getz' exclusive artist's contract with MGM provided for the payment of royalties to Getz on the basis of 5% of 90% of the retail sales of records made for MGM by Getz, less certain adjustments. (JA 240.) Under his contract Getz received guaranteed royalties of \$10,000 per year. (JA 201.) Defendants offered in evidence Getz' contract with MGM. Defts' Ex. 3 for identification, JA 88-90, 210, 260.) The trial court refused to admit it in evidence. If it had been received in evidence it would have shown that it contains the limitations and restrictions referred to above as standard or usual in an artist's royalty contract.

One of the usual provisions of an artist's royalty contract, as Byrd himself testified (JA 162) requires the cost of the recording session, the cost of the musicians plus the cost of the recording be charged against the royalties payable to the artist. In this case the cost of the musicians scale wages and pension contribution in the two recording sessions (exclusive of the amount shown payable to Getz himself) totaled \$1,714.13. (JA 162, 163, Pltf's Ex. 1 and 2, JA 49-50.) This amount was chargeable against the \$10,000 amount of guarantee royalties payable to Getz under his contract. Defts.

Ex. 3 for identification, par. 5, JA 88.) Byrd did not have any discussion with Getz about this provision of his contract but agreed that this is a usual provision. Byrd made no offer to Getz to share with him any part of this expense which included Byrd's own union scale compensation. (JA 162, 163.)

Pursuant to the pretrial proceedings (JA 26-29) defendants filed a schedule showing 90% of total retail sales of the recordings here in issue and the computation of royalties credited to Getz under his contract with respect to sales of these recordings. The schedule shows such sales to have totaled as of August 31, 1966, 211,634 for the single record "Desafinado", 175,383 for the mono version of "Jazz Samba", and 109,413 for the stereo version of the latter. Royalties credited to Getz on these sales totaled \$74,624.19. Defts' Statement Pursuant to Order of Pretrial Examiner. (JA 30-32.)

Pursuant to the Pretrial proceedings the case was tried to the jury solely on the issue of liability. (JA 28-29.) The jury returned a special verdict finding that Byrd was entitled to recover a royalty of 2-1/2% of sales from defendant MGM with interest and 40% of royalties paid to defendant Getz without interest. (JA 33-34.) Upon this verdict and the foregoing schedule of sales and royalties, the trial court entered judgment without a hearing on the issue of the

amount of liability and without any findings of fact except for the attachment to the judgment of computations made by Byrd's accountant based upon Defts' Statement Pursuant to Order of the Pretrial Examiner. (JA 35-39). The judgment against MGM is in the amount of \$59,801.58 and against Getz in the amount of \$29,849.68. Satisfaction against either or both defendants was specifically limited to the amount of \$59,801.58. (JA 35.)

Appellants thereafter and within the time permitted by the rules filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. (JA 40-42.) These alternative motions were denied by the trial court on August 28, 1967. (JA 47.) Notice of Appeal was filed on September 22, 1967. (JA 48.) This appeal was docketed in this Court on October 30, 1967.

Statutes and Rules Involved

District of Columbia Code:

"Section 15-109. Interest on judgment for damages in contract or tort.

In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. In an action to recover damages for a wrong the judgment for the plaintiff shall bear interest. Added Aug. 30, 1964, Pub. L. 88-509, § 3(b)(1), 78 Stat. 677."

Rules, United States District Court for the District of Columbia

"Rule 9(h). MOTIONS FOR SUMMARY JUDGMENT.

In addition to the points and authorities required by subparagraph (b) of this Rule there shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a statement of the material facts as to which the moving party contends there is no genuine issue.

Any party opposing the motion may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. (Added February 5, 1960)

In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as

and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion. (Added February 5, 1960)"

Rule 52(a), Federal Rules of Civil Procedure:

"Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Statement of Points

I. The Trial Court erred in denying appellants' motions for summary judgment, directed verdict and judgment notwithstanding the verdict in that on the undisputed facts of record, as a matter of law, there can be no contract implied-in-fact or quasi-contract for the payment of any royalties to appellee by either appellant.

II. The Trial Court erred in denying appellants' motions for directed verdict and for judgment notwithstanding the verdict in that on all the facts of record appellee was not entitled to go to the jury and appellants are entitled to judgment in their favor notwithstanding the verdict.

III. Appellants are entitled to a new trial for errors on the trial of the case as follows:

(a) The Trial Court erred in excluding from evidence the American Federation of Musicians Phonograph Record Labor Agreement of January 1959;

(b) The Trial Court erred in excluding from evidence the exclusive artists royalty contract between appellants MGM and Stan Getz;

(c) The verdict of the jury was against the weight of the evidence;

(d) The verdict of the jury is inconsistent on its fact in awarding damages on inconsistent theories against appellants MGM and Stan Getz;

(e) The Trial Court erred in failing to hold a hearing on the measure of damages, in computing the damages granted to appellee and in failing to make findings of fact to support the judgment;

(f) The Trial Court erred in submitting the question of interest to the jury in the absence of proof of damages to appellee as the basis of his claim to interest.

Summary of Argument

In this case there was an existing relationship between appellant MGM and appellee in the form of an express written collective bargaining agreement between appellee's labor union and MGM which spelled out in detail the compensation to which appellee was entitled for services rendered to MGM. Appellee was paid in full for his services to MGM in accordance with the terms of that collective bargaining agreement. He never at any time until this suit was filed asked MGM or appellant Getz for any additional or different compensation.

It is a general rule of law that an express written contract between two parties cannot be changed by implication. Where there is an express contract there can be no contract implied-in-fact or quasi-contract covering the same subject matter. As a matter of law appellee's suit should have been dismissed or defendants on their motion therefor (JA 8) should have been awarded summary judgment in their favor on the undisputed facts of record.

In any event appellee's evidence below, and the entire record before this Court, clearly establishes that appellee had no contract implied-in-fact or quasi-contract under which MGM was required to

pay any royalties to appellee or which required Getz to share with appellee any of the royalties payable to him under his express contract with MGM.

Royalties are paid to musical artists in the record making business pursuant to detailed contracts with standard provisions requiring negotiation between the parties. In exchange for a royalty in addition to union scale an artist agrees to perform exclusively with the recording company for a specified period. He agrees that musicians' pay and recording expenses may be deducted from his royalties. He agrees not to play the same music for another recording company for an agreed period following the termination of his contract. Such a contract with its many provisions requiring negotiation cannot be "implied-in-fact" and obviously cannot be the subject of a "quasi-contract". Appellee's own actions, as he himself testified, were inconsistent with the actions required of an artist by the normal and standard provisions of a royalty contract. He thus obviously did not consider at the time of his musical performance that he was to be paid royalties under the terms of any such standard or normal contract. He is seeking in this proceeding, therefore, all of the advantages and none of the disadvantages of a royalty contract and is asking that this absurd result be "implied".

There was no substantial evidence in the entire record entitling appellee to go to the jury on this issue of an alleged contract implied-in-fact or quasi-contract with Getz requiring Getz to pay to appellee some fractional portion of the royalties Getz was entitled to receive from MGM on sales of the recording in issue. Appellee demonstrated that at the time of the making of the recording he had no expectation of sharing in Getz' royalties by repeatedly testifying that he never discussed the terms of Getz' royalty contract with him. There is no precedent in law for the implication of a complicated three party contract which would have been necessary if Byrd had requested a royalty on the making of this recording.

Byrd further demonstrated his intention not to contract for a share of Getz' royalties by making no offer to share with Getz the expenses of the musicians at the recording session.

The foregoing establish appellants' right to a reversal of the judgments against them and to judgment in their favor notwithstanding the verdict of the jury.

In the alternative, appellants are entitled to a new trial because of the errors at the trial, particularly the refusal of the trial court to permit the introduction into evidence of the Phonograph Record Labor

Agreement of January 1959 which established the employer-employee relationship between Byrd and MGM and the artist's contract between MGM and Getz, a portion of the proceeds of which Byrd is seeking to recover for himself without in any way subjecting himself to the limitations and restrictions therein imposed. Furthermore, if for any reason appellants are deemed not to be entitled to judgment in their favor on all of the evidence, the verdict was against the weight of the evidence entitling appellants to a new trial. Also the verdict is inconsistent on its face in finding a different standard of liability against MGM than against Getz contrary to appellee's theory of a joint venture with Getz adopted by MGM.

The verdict is also inconsistent on its face in allowing interest against MGM and no interest against Getz when the issue under the District of Columbia statute turns on damages to the claimant. Furthermore no damages were proved. For this reason also the verdict should be set aside.

The trial court erred in failing to afford appellants a hearing on the issue of the amount of liability to determine the actual amount of "sales" of records on which royalties might be payable to appellee and in failing to make findings of fact as required by Rule 52(a) Federal Rules of Civil Procedure.

Argument

I. As a Matter of Law There Can Be No Contract Implied-in-Fact or Quasi-Contract for the Payment of Any Royalties to Appellee on Sales of the Phonograph Records Here in Issue.

A. The express contract between appellee and MGM precludes any implied-in-fact or quasi-contract.

The claim against appellants in this case is based upon an alleged contract implied-in-fact or quasi-contract. (Pretrial proceedings, JA 27.) The amended complaint referred only to a contract implied-in-fact. (Amended Complaint, paras. 9 and 10, JA 4.) The case was submitted to the jury under instructions relating to both theories of appellee's claim. (JA 292, 293.) There was also submitted to the jury the question whether there existed a joint venture between appellee and appellant Getz. (JA 294.)

It is appellants' position that the undisputed facts establish that as a matter of law they were both entitled to judgment in their favor on any and all of appellee's alternate theories for sustaining his alleged claim.

A contract is implied-in-fact when the dealings between the parties are such that there must be implied from their actions a

mutual agreement even though that agreement has not been reduced to words either written or spoken. (17 AmJur 2nd, Contracts, Section 3.) A quasi-contract, on the other hand, does not depend upon the implication of a mutual agreement but is a contract implied-in-law to prevent the unjust enrichment of one person at the expense of another. (46 AmJur, Restitution & Unjust Enrichment.)

It is appellants' position that there can be no contract implied-in-fact or quasi-contract when the same subject matter is covered by an express agreement.

This rule was recognized in the District of Columbia as early as 1803 in the decision of Krause & Gloyd v. Deblois, 1 D.C. 138, where the headnote states:

"The plaintiff cannot recover from a general indebitatus assumpsit, if a special agreement be proved.

Accord, Nutt v. Minor, 55 U.S. (14 How.) 464, 14 L.ed 500 (1852); Campbell v. District of Columbia, 2 MacArthur 533, 9 D.C. 533 (1876); Burgers v. Grooms, 81 A.2d 238 (D.C. Mun.App., 1951).

The rule is recognized generally in the Federal Courts and was succinctly stated in United States For Use of Westinghouse Electric Supply Co. v. Ahearn, 231 F.2d 353, 356 (CA 9th, 1955):

"The terms of the express contract control. There cannot be an implied contract either in law or in fact contrary in terms to a controlling express contract."

In Rogers v. American President Lines, Ltd., 291 F.2d 740 (CA 9, 1961), the plaintiff, a member of the National Union of Cooks and Stewards, sued for the reasonable value of his services which he claimed to be the amount paid plus an increase equal to a percentage wage increase granted to all other unlicensed deck and engine department employees. Plaintiff was employed under the terms of a collective bargaining agreement and a consent decree in connection with a labor dispute which were incorporated into the terms of the shipping articles signed by plaintiff before a shipping commissioner prior to each voyage. He contended that this express contract did not and was not intended to specify the full compensation to be paid for his services. The court in holding against his contentions said, p. 742:

"An action does not lie on an implied contract where there exists between the parties a valid express contract which covers the same subject matter."

Accord, Klebe v. United States, 263 U.S. 188, 192, 68 L.ed 294 (1923); National Trailer Convoy, Inc. v. United States, 345 F.2d 573, 576 (Ct.Cl., 1965); Haber v. Bond Stores, 178 F.2d 836 (CA 8, 1949), at p. 839; Martin v. City of Port Huron, 111 F.2d 759 (CCA 6, 1940), at p. 761; Ferroline Corp. v. General Aniline & Film Corp., 107 F.Supp. 326, at 340, aff'd 207 F.2d 912, at 926

(CA 7, 1953); cert. den. 347 U.S. 953, 98 L.ed 1098, rehearing den. 347 U.S. 979, 348 U.S. 851; Williston, Contracts (3rd Ed.) Section 36, Note 10; Restatement of the Law of Restitution, Chapter 4, Section 107(1); 17 Am Jur 2d, § 3, p. 336.

Here there were two express contracts between appellee and MGM. The collective bargaining agreement between MGM and appellee's labor union set the general conditions of employment applicable to all recording service contracts between recording artists who were members of the union and MGM. (Dfts' Ex. 1 for identification, JA 59-87.^{3/}) It is undisputed that appellee was a member of the union and bound by the terms of this collective bargaining agreement. (Pre-trial proceeding, JA 26.) Pursuant to this agreement MGM and appellee entered into a second express contract for the recording services here involved. (Pltf's Ex. No. 1, JA 49.) This express contract establishes appellee as an employee of MGM in connection with the services rendered to MGM in producing the album "Jazz Samba" and the single record "Desafinado" and the amount due for those services to appellee. Appellee concedes that he has been fully paid as provided in that agreement. (JA 152.) It is thus axiomatic, as the authorities cited so clearly establish, that appellee, having

^{3/} Inexplicably the court below refused to admit this contract into evidence. (JA 183-185.)

expressly agreed in writing to perform the services here in question for a specified sum, may not recover any additional amounts for the same services based upon an implied-in-fact contract or quasi-contract.

The real nub of appellee's argument is that it is "unfair" for MGM to have profited from the successful recording here in question when appellee only received \$570.66 for his recording services.^{4/} The short answer to this is succinctly set forth in 17 C.J.S., Contracts, Section 6 where it states:

"A quasi contractual principle of unjust enrichment does not apply to an agreement deliberately entered into by the parties, however harsh the provisions of such contract may seem in light of subsequent happenings."

Appellee never contemplated that the recording would become such a success (JA 155) and at the time he made the recording he entered into one express contract for his services and no implied-in-fact contract or quasi-contract can alter the terms of that express contract setting his full compensation for services rendered.

In the face of these irrefutable facts and rules of law the District Court clearly erred in denying appellants' motion for summary judgment or, after trial, its motion for judgment notwithstanding verdict and the decision below should be reversed.

^{4/} Of course he also received royalties with respect to his copyright of the song "Samba Dees Days" which is included in the album. (JA 155-156.)

B. The labor-management agreement between appellee's union, acting on his behalf, and MGM precludes any implied-in-fact or quasi-contract.

The Phonograph Record Labor Agreement of January 1939

(Dfts. Ex. 1 for identification, JA 59-87) entered into between appellant MGM and the American Federation of Musicians, the latter acting on behalf of appellee who at all times here material was a member of the union (JA 26), specifically precludes the type of implied royalty agreement alleged to exist here. Paragraph 13 of the union agreement provides (JA 66):

"13. The following provision shall be included in, and whether or not so included, shall be deemed part of all contracts calling for recording services between the Company and persons covered by this agreement:

'This contract shall not become effective unless and until it shall be approved by the International Executive Board of the American Federation of Musicians of the United States and Canada, or by a duly authorized agent thereof. ''

Paragraph 1 of this agreement (JA 59-60) makes it applicable to all union members who shall perform services for MGM as musicians in the recording of phonograph records. Appellee and MGM are thus clearly covered by this agreement and by its terms cannot enter into a binding contract for any recording services unless and until the contract has been approved by the union, a requirement clearly not

capable of being met where as here the alleged contract is an implied-in-fact contract or quasi-contract. Appellee offered no evidence that union approval of the alleged contract was ever in fact sought or obtained.

The existence of this labor agreement and the failure to fulfil the conditions of Paragraph 13 is, in the context of this case, an absolute bar to appellee's claim for royalties based upon an alleged implied-in-fact or quasi-contract. The presence of the union as exclusive bargaining agent for all of its members, including appellee (Pre-trial Proceedings, JA 26, Para. 10 of Dfts. Ex. 1 for identification, JA 63), precludes any private contracts between union members and MGM. The union labor agreement sets the conditions of employment for all union members and obligates the member to accept every burden as well as entitling him to receive every benefit.

National Labor Relations Board v. Allis Chalmers Mfg. Co., 388 U.S. 175, 18 L.ed 2d 1123 (1967); J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332, 88 L.ed 762 (1943); National Labor Relations Board v. U. S. Sonics Corporation, 312 F.2d 610, 615 (CA 1st, 1963).

In Allis Chalmers, supra, the Supreme Court upheld the right of a union to punish its members for crossing a picket line. At issue

was a conflict between the right of the employee to bargain separately with his employer and the right of the union as exclusive bargaining agent of all the employees. The Court resolved this conflict in the following language, 388 U.S. 175 at 180 (18 L. ed 2nd 1123, at 1127-1128):

"National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom he represents . . . ' Steele v L. & N. R. Co. 323 US 192, 202, 89 L ed 173, 183, 65 S Ct 226. Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them." (Emphasis added.)

Application of these principles of this case clearly supports the view that there could not have been a valid royalty contract between MGM and Byrd without union approval of the agreement. Paragraph 13 of the union-MGM agreement (JA 66) explicitly conditions the formation of a valid contract on prior approval by the union. In addition,

Paragraph 2 of the agreement (JA 60) forbids MGM from requiring, requesting, inducing, or in any manner attempting to influence any person covered by the agreement to perform services except as permitted by the agreement. Thus the alleged implied royalty contract would, if it existed, violate the terms of the union-MGM agreement and would mean that MGM had violated Paragraph 2 of the agreement by inducing appellee to play for a royalty without obtaining prior union approval of the royalty contract.^{5/} It is thus evident that appellee, having given up the right to bargain separately by accepting the collective bargaining of his union, is bound by the negotiated agreement and may not enter into a valid recording contract without obtaining union approval of the contract.

In addition, as a matter of general contract law, Paragraph 13 of the union-MGM agreement is a bar to any claim for royalties by appellee. In Los Angeles Rams Football Club v. Cannon, 185 F.Supp 717 (S.D. Calif. 1960) the Rams attempted to forbid Billy Cannon, a College football star, from playing football for any other professional football team. The basis of their argument was that Cannon had signed

^{5/} In fact, inasmuch as the royalty agreement alleged to exist would violate MGM's contract with the union and could be construed as an attempt to undermine union power, its existence would constitute an unfair labor practice and thus be against public policy and unenforceable. National Licorice Co. v. National Labor Relations Board, 309 US 350, 84 L ed 799 (1939).

exclusive playing contracts for three years with the Rams and that he was bound by these contracts. The contracts, signed both by Cannon and the Rams, also stated that (185 F Supp at 721):

"This agreement shall become valid and binding upon each party hereto only when, as and if it shall be approved by the Commissioner."

The Commissioner's approval had not been sought as to two of the three years contracted for and the court concluded with respect to those years (185 F Supp at 723-724):

"It is my conclusion, therefore, that until approved, these instruments are, at most, only offers.

In this respect these instruments are not like the numerous contracts we see containing conditions precedent to the creation of obligations thereunder. These instruments do contain the condition precedent of making the team before the obligation to pay the salary arises, but the requirement for approval in these instruments is much more than a condition precedent to a mere obligation; it could be characterized as a condition precedent to execution but it is more properly to be denominated a part of execution, so made by the people who drew up the form.

If we are to adhere to the doctrine of freedom of contract we must allow parties to specify any degree of formality to the act of execution they wish so long as it doesn't violate public policy or some rule of law."

This conclusion finds support in New York Football Giants v. Los Angeles Chargers F. Club, 291 F. 2d 471, 473 (CA 5th, 1961) and cases there cited. The parallel between those cases and the instant case do not require further elaboration.

The Court in Los Angeles Rams Football Club v. Cannon, supra, does not invoke the "condition precedent" concept, finding instead that the approval was a part of the formality of signing which was necessary before a contract could exist. Even if Paragraph 13 of the union-MGM agreement (JA 66) were only a condition precedent to performance of the contract it would clearly bar recovery. There is no doubt that the language used in Paragraph 13 at least creates a condition precedent which when unfulfilled, as here, prevents the alleged contractual obligations from arising. (17A Corpus Juris Secundum, Contracts § 338.)

What is said about the effect of Paragraph 13 of the union agreement on the claim of appellee against MGM is equally applicable to his claim against Getz which depends on an alleged implied tripartite agreement between Byrd, Getz and MGM. (JA 253, 254.) Since this involves union members and a union employer it also requires union approval.^{6/} The testimony on behalf of MGM (JA 210) that it has never paid royalties without an express written contract is consistent with the foregoing interpretation of Section 13 of the Phonograph Record Labor Agreement.

6/ If appellee's various and varying theories of his case should shift to a claim of a simple assignment to him by Getz of a part of his contractual royalties due from MGM he has proved no notice to MGM of such assignment. Such assignment by implication of amounts due under an express written contract is unprecedented in law.

The undisputed facts here relied upon clearly establish that the alleged implied-in-fact or quasi-contract between appellee and appellants was barred both by the existence of an express contract between MGM and appellee for the same recording services and by the terms of the labor-management agreement which bound appellee and both appellants. For these reasons the District Court clearly erred in denying appellants' motions for summary judgment, for directed verdict and for judgment notwithstanding the verdict.

II. On All of the Facts of Record, Appellee Was Not Entitled to go to the Jury and Appellants Are Entitled to Judgment in Their Favor Notwithstanding the Verdict

On the basis of all of the facts of record in this case appellants were entitled to a directed verdict and are therefore entitled to a reversal of the judgment against them and to judgment in their favor. This is true on all of the evidence even without regard to the prior existing legal relationship between the parties that entitle appellants to judgment in their favor as a matter of law. The undisputed evidence establishes that there existed no mutual understanding between the parties which can be implied in fact and further demonstrates that appellee was entitled to no recovery from either appellant on any quasi-contractual theory of unjust enrichment

A. There was insufficient evidence to go to the jury with respect to the alleged claim against appellant Getz

Appellee contends that he is entitled to recover one-half of the royalties received by appellant Getz from the recording here in question because he was a joint adventurer with Getz in making the recording. It is not sufficient to establish such a relationship by merely showing that the two worked together since such logic would mean that every musician who performed for the recording was a joint adventurer. To establish a joint adventure there is required proof that (30 Am. Jur., Joint Adventures, Section 6):

"two or more persons combine their money, property, or time in the conduct of some particular line of trade, or for some particular business deal, agreeing to share jointly, or in proportion to the capital contributed, in the profit and losses, assuming that the circumstances do not establish a technical partnership. (Emphasis added.)

There is a startling lack of evidence of any kind produced by appellee to establish that there was an agreement to share profits and losses between Getz and Byrd. The sum total of appellee's evidence regarding the nature of his relationship with Getz is that he and Getz agreed to record an album in which Getz and appellee would be equally featured and that the two worked together as employees of MGM in producing the album. (JA 90-109). There was never even an implication that

either party was sharing anything related to the operation. From his own royalties, Getz paid the musicians, including appellee, based on the union scale, and appellee neither offered to nor did he share these costs.^{7/} These payments included the costs of the first abortive recording session in New Jersey in which case appellee also received his minimum union salary from Getz' royalties. (Pltf's Ex. No. 2, JA 50; Deft's Ex. No. 3 for identification, paras. 5, 9.) (JA 88, 89, 142-144.) Byrd never knew what, if any, royalties Getz was to receive and thus actually was never aware of any potential profits that might be generated by the recordings. (JA 139, 159.) What these facts clearly demonstrate is that Getz and Byrd regarded themselves as independent contractors and not joint adventurers and they never contemplated any implied or express contract between them. Appellee's error is in assuming that joint billing necessarily meant that there was a joint adventure. The evidence he produced simply does not establish the relationship.

In fact, Byrd candidly admits that he had not anticipated that the recording would be anything like the success that it was. (JA 155.)

^{7/} While actual payments for the recording sessions were made by MGM, Getz' royalty contract with MGM provided that such payments would be deducted from Getz' royalties. (Pltf's Ex. No. 1 and 2; JA 49-50);(Deft's Ex. No. 3 for identification, JA 88, 89).

He was thus perfectly content to have Getz pick up the \$1700 of expenses for making the recordings without expecting to pay anything himself and in addition pocketing \$570.66 for himself which Getz paid. Then, more than three years after his original meeting with Getz, appellee joined Getz as a party in this proceeding and here attempts to share in the profits but still without offering to share in the expenses. Although Byrd insisted he did not know the terms of Getz' contract and did not discuss it with him (a fact which itself demonstrates a lack of any interest in sharing in its proceeds), he admits that it is "the usual arrangement" in an artist's royalty contract to deduct the cost of the musicians from the royalties due the artist. (JA 161-163.)

No reasonable man could conclude from the foregoing that any implied contract of joint adventure existed between Getz and Byrd and the District Court below erred in not granting Getz' motion for directed verdict or for judgment notwithstanding the verdict.

B. There was insufficient evidence to go to the jury with respect to the claim against appellant MGM

Appellee's claims of an implied-in-fact contract or quasi-contract against MGM are apparently based on only one factor -- the success which "Jazz Samba" and Desafinado" enjoyed after they were

released. The question is, however, whether any evidence was produced that at the time the recordings were made any compensation other than that provided in the B-4 contract (Pltf's Ex. No. 1 and 2, JA 49-50) was intended by the parties.

Appellee could establish existence of a contract implied-in-fact (Instructions to the Jury, JA 293):

"only if . . . there existed facts and circumstances which are the equivalent of an express agreement between the parties . . . that the parties were, in fact, in agreement and had a meeting of minds as to essential terms for computing and sharing royalties."

The record establishes the very opposite of the requisite facts. Appellee has asked for and received here 2-1/2% of gross retail sales of the records in question. At no time did he even attempt to establish that MGM considered that figure or that there was any meeting of the minds with respect to the figure. All of the evidence herein clearly discloses that the royalty to be paid under an artist's contract is a figure which has to be negotiated. (JA 108, 122.) Appellee justifies the arbitrary 2-1/2% of gross retail sales claimed by him on the basis of being one-half the royalty paid Getz (which it is not, in fact, since Getz' royalty is based on 90% of retail sales after deduction of packaging costs and payment of musicians expenses (Deft's Ex. No. 3 for identification, JA 88-90, JA 30)) even though appellee did not know what if any royalty would be paid to Getz when he performed

the services here in question (JA 139) and on the uncertain testimony of an officer of another recording company who testified that if he had made the recording here in issue he would have tried to work out "if possible" an even split between Byrd and Getz of a 5% royalty.

(JA 122.)^{8/}

In addition the necessary meeting of the minds was in appellee's opinion a one-way street on which he got all the benefits but assumed none of the burdens of a royalty contract. Byrd testified to his understanding of the "standard" or "usual" provisions of an artist's contract for royalties which include provision for the exclusive services of the artist for the benefit of the recording company for a specified period and specified renewal options (JA 160), the deduction of certain recording expenses including the expenses of musicians union scale from royalties payable to the artist (JA 162), agreement by the artist not to play the same music for another recording company for a specified period, usually five years after termination of the contract (JA 164), and agreement by the artist to make a specified minimum number of records for the recording company during the term provided in the contract (JA 165).

8/ Al Lewis testified that where a royalty contract existed with two co-featured artists the division would frequently not be 50-50. (JA 213.)

However, appellee did not feel that he was in any way bound by these standard and usual provisions in royalty agreement and in fact did shortly after recording "Jazz Samba" come under exclusive contract to Riverside and record one of the "Jazz Samba" numbers for Riverside. (JA 164, 182-183.) In fact his exclusive agreement with Riverside was all but signed prior to the making of the "Jazz Samba" recording for MGM. (JA 127.) It is beyond the comprehension of the reasonable man to determine what would motivate MGM to agree to pay royalties to an artist on a recording when the artist does not agree to any of the standard and usual conditions imposed in a royalty contract.

Equally significant is the fact that appellee never thought to even discuss royalties with any representative of MGM (before or after the recording). (JA 17.) Furthermore, appellee indicated clearly that he had no understanding at the time of making the recording in issue that he would be entitled to royalties thereon by failing at any time prior to the filing of this suit to make any claim for such royalties. He had several conversations with Creed Taylor, the producer of the recording in issue, in which it was recognized that royalties were not being paid. (JA 154, 155.) MGM at that time offered to Byrd the chance to make a sequel to "Jazz Samba" in which

a formal contract would provide for royalties to Byrd. (JA 155.) This could not be arranged because by that time Byrd had signed an exclusive artist's royalty contract with Riverside. (JA 125.) Although in these conversations the fact that Byrd was not being paid royalties on the "Jazz Samba" recording was recognized, Byrd failed to claim that any royalties were then due to him. This is not the normal conduct of anyone who thinks he has a legal right to be paid. His only explanation for failing to make a claim in these conversations was that he felt foolish and embarrassed about the whole thing that he had taken such bad care of himself. (JA 167.) This testimony is more consistent with an understanding by Byrd that no royalties were due than with an expectation from the beginning that he would receive a royalty.

As to appellee's claim of unjust enrichment by MGM he has been equally remiss in presenting any persuasive evidence. In the first place, there is no evidence whatsoever as to what profits, if any, MGM made from the recording in issue. In the second place, it is vehemently denied that any enrichment accruing to MGM from the services of Charlie Byrd was unjust. See Roebling v. Dillon, 103 U.S.App. D.C. 237, 288 F.2d 386 (CADC, 1961), cert. den. 366 U.S. 918, 6 L ed 2d 241 (1961). In conversations between Creed Taylor and Charlie Byrd, Taylor said something to the effect that Byrd had

gotten the short end of the stick. (JA 155.) This is not in any sense an admission by Taylor that Byrd was entitled to any more than the short end of the stick. Byrd testified that in the same conversation he and Taylor "agreed it had all been laxly put together from a business standpoint because no one expected it to be quite the success it was." (JA 155.)

This is the complete and final explanation of Byrd's conduct during the entire course of the recording and the conversations leading up to it. He did not expect the recording to be a great success. Therefore, he did not wish to bind himself in any way to MGM in order to obtain a royalty contract. He also elected to be free from the obligation of paying his share of the musicians expense on the recording, only some \$1700, rather than contract for a royalty.

The inadequacy of appellee's evidence to go to the jury in the trial of this case is strikingly demonstrated in his lack of evidence regarding his claim of having done the "arranging" of the music for the recording.^{9/} See paragraph 3 of the Amended Complaint, (JA 3) where appellee alleges:

"and as a further part of the plan, plaintiff was to devise and effect the musical arrangement for

^{9/} Significantly this is the sole claim made by appellee as to any work which he did beyond that normally expected of any leader at a recording session.

all the pieces, since he had acquired greater experience and skill in the jazz-samba type of music involved in the projected recordings." 10/

In the pre-trial proceedings, it was stated to be a part of appellee's claim: "It was understood . . . that P was to perfect the musical arrangements. P devised and effected the musical arrangements." (JA 27.)

On appellants' motion for summary judgment, Judge Gasch of the District Court considered appellee's claim with respect to the musical arrangements as the basis of denying the motion to afford to appellee "the opportunity of presenting evidence as to the value of additional services rendered." (JA 25.) Judge Gasch granted to appellee this opportunity to present proof at a trial although appellee had failed to file a "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated" as required by Rule 9(h) of the Rules of the District Court. The only opposition filed to appellants motion for summary judgment was in the nature of a legal argument (JA 18) and was unsupported by any affidavit countering the affidavit of Creed Taylor supporting appellants' motion (JA 9) and Statement of Material Facts filed in compliance with Rule 9(h). In the light of the absence

10/ This allegation was denied in appellant's answer thereto. (JA 5.)

of any significant testimony at the trial on the issue of musical arrangements it is not surprising that nothing was presented by appellee on this issue at the time of appellants' motion for summary judgment. In his memorandum Judge Gasch stated (JA 24-25):

" . . . Plaintiff's counsel also takes the position that Byrd did more than simply playing the guitar and acting as the leader, which entitled him to double union scale. In short, he brought back this music from South America and rearranged it into the score that became the record which has been successfully distributed by defendant and which has resulted in an outstanding financial success to defendant. In the absence of a written contract covering this aspect of the services performed by Byrd, plaintiff's counsel seeks to have the Court afford plaintiff the opportunity of proving this so-called "implied in fact" contract.

The Court is by no means certain as to the proper measure of damages, or whether damages should be awarded on a percentage of the royalties obtained or awarded at all.

The Court does feel, however, that under the peculiar circumstances of this case Byrd has contributed more than simply playing the guitar and the leading of this musical performance. Accordingly, the Court feels that he should be afforded the opportunity of presenting evidence as to the value of additional services rendered . . ."^{11/}

^{11/} Subsequent to this memorandum Judge Gasch recognized the principle of law that we urge here to the effect that an express contract forbids an implied-in-fact or quasi-contract covering the same subject. Lutcher S. A. Celulose E Papel Candoi v. Inter-Amer. Dev. Bank, 253 F. Supp 568 (D.C., 1966). He states the rule as follows (253 F. Supp at 570):

"Where the contract between the parties is detailed and specific . . . the courts will not improvise an implied contract.

In the light of this specific opportunity afforded by the District Court to present evidence on this claimed crucial portion of appellee's contribution to the alleged joint venture, what was the evidence actually produced by appellee? Byrd was asked by his counsel: "Was there any talk [with Creed Taylor of MGM] about the musical arrangement, that is, the actual musical arrangement?" He replied: "We agreed I was to prepare the music and do whatever arranging had to be done because I had access to the music. They weren't readily available in this country in this country at all." (JA 140.) This was absolutely all of appellee's testimony about doing the musical arranging; he did not say he actually did any arranging; he said only that he agreed to do whatever "had to be done." He did not testify that anything at all "had to be done."

The only evidence in the entire record indicating that any arranging may have been done by Byrd appears in the liner notes in the album cover where it is stated: "Byrd sketched out the routines for the songs. Where two bases were used he wrote in more detail." (Pltf's Ex. No. 3, JA 53.)

The foregoing is no evidence of any substantial work in itself or of any significant contribution to the ultimate success of the recording. A musical arrangement is a writing consisting of musical

notes and symbols set down on a sheet of music. No such documents were offered by appellee and no explanation was given for their absence. At the same time the liner notes referred to the improvisations on the melodic content of the music by both musicians. No musical arrangements or scores are needed or used by musicians in their improvisations. The recording of "Jazz Samba" included substantial improvisations by both artists. (JA 153, 176.)

The recording was not a total loss to Byrd. He did receive his double union scale as leader at two recording sessions. He obtained much publicity as a result of the success of the record. (JA 169.) He identified himself with a music form -- the Bossa Nova -- then new in the United States which is especially adapted to his musical instrument. (JA 172.) He did receive copyright royalties on one number included in the album of which he was the author. (JA 155.)

It is submitted that Byrd was more interested in making the record, having his name co-featured with the name of Getz and obtaining such incidental benefits as the satisfaction of introducing the Bossa Nova into the United States than in obtaining royalties from the sale of the music. He knew that if he had asked for royalties from MGM there would have resulted negotiations involving the problems of the limitations on Byrd with reciprocal benefits to MGM and the

possible request to Getz that he release a part of the royalties provided to him under his express artist's royalty contract. These negotiations might have resulted in an impasse between the parties with the consequences that the record might never have been produced. In the light of his doubts about the possible commercial success of the record Byrd was not interested in royalties but did want to make the record as a co-featured artist with Getz.

In the light of the foregoing and appellee's burden of proof, the case should never have been submitted to the jury. Appellants are entitled to a reversal and judgment in their favor.

III. Alternatively, Appellants Are Entitled to a New Trial for Errors in the Trial.

Appellants submit that they are entitled to judgment in their favor for the reasons set forth above. If for any reason not now apparent to appellants it should be decided that they are not entitled to judgment in their favor, then they are entitled to a reversal of the judgment against them and to a new trial for the errors committed at the trial of the case. ^{12/}

12/ Appellants' motion for a new trial at the close of the proceedings below relied upon, as one of its grounds, newly discovered evidence in the form of a statement by Byrd in a local radio station interview that he had not asked for a royalty contract from MGM because he had not expected the Jazz Samba recording to be a success. The transcript of the testimony in the case was not yet available to counsel for appellants at the time this motion

A. The Trial Court erred in excluding from evidence the Phonograph Record Labor Agreement of January 1959.

The American Federation of Musicians Phonograph Record Labor Agreement of January 1959 (Defts' Ex. No. 1 for identification, JA 58 et seq.) was offered in evidence by defendants initially to show to the jury the provisions of Paragraph 13 thereof which require the submission to the union for approval of every contract between a union member and a union employer. This offer of evidence was denied by the trial court. (JA 183-185.) This exhibit was agreed to at pre-trial, subject only to legal objections. (JA 29.) This exhibit was re-offered by appellants and receipt in evidence was denied by the court. (JA 270.) What has been heretofore said above in Points I and II clearly demonstrates the relevancy and materiality of this exhibit. It defined the pre-existing relationship between appellee, Byrd, and MGM and between MGM and Getz. The amounts stated as payable to appellee in his own exhibits Nos. 1 and 2 (Pltf's Ex. No. 1 and 2, JA 49, 50) were computed under the provisions of the Phonograph Record Labor Agreement. (JA 58, 72-74.)

was filed. Appellee testified at the trial (JA 155) that "we agreed it had all been very laxly put together from a business standpoint because no one expected it to be quite the success that it was." In the light of this express testimony at the trial appellants no longer include Byrd's statement at the post-trial radio interview as one of the grounds for their right to a new trial.

Appellee's claim is essentially based upon an alleged implied variation in the relationship defined by this Phonograph Record Labor Agreement. Without the starting point how can there be any meaningful consideration of claimed subsequent implied legal relationships between the parties hereto?

Appellants, at the very least, were entitled to present to the jury the requirements of the Phonograph Record Labor Agreement that all contracts for recording services be approved by the union before they can become effective. Appellants were entitled to argue to the jury that there could be no effective contract for royalties for recording services unless the contract had been approved by the union. The trial judge denied appellants this argument by refusing admission of this exhibit as a part of the evidence at the trial. This was error prejudicial to appellants entitling them at least to a new trial.

B. The Trial Court erred in excluding from evidence the contract between Getz and MGM

Appellants offered in evidence the exclusive artist's royalty contract between Getz and MGM pursuant to which MGM paid to Getz the royalties in which appellee claims the right to share. (Defts' Ex. No. 3 for identification, JA 88-91, 210-212.) It was agreed to

at pretrial subject only to legal objections. (JA 29.) Its acceptance in evidence was denied by the trial court thus depriving appellants of the opportunity to show to the jury all the terms, conditions and limitations upon Getz which appellee pretends did not exist and should not apply to him although he claimed the right to share equally with Getz all the royalties payable to Getz under the contract. Since appellee was suing for a share of the benefits of this contract the relevance and materiality of the entire contract in this case is undeniable.

The failure of the trial court to admit this document in evidence was an error prejudicial to both appellants, and requires reversal of the case for this error alone.

C. The Verdict of the Jury was against the weight of the evidence entitling appellants to a new trial

All that is said under II above clearly establishes that if appellants are not entitled to judgment notwithstanding the verdict they are at least entitled to a new trial on the ground the verdict is against the weight of the evidence. There is no need to repeat at this point what is said above as the conclusion follows automatically.

D. The verdict of the jury is inconsistent on its face entitling appellants to a new trial

The special verdict in this case found appellee to be entitled to royalties from MGM at the rate of 2-1/2% of sales. At the same time it found appellee to be entitled to 40% of royalties actually paid to Getz. (JA 33.) Judgment was granted to appellee on both verdicts with the proviso that satisfaction may not exceed the amount of the larger separate judgment against MGM. (JA 35.) The recognized necessity for this proviso in the judgment itself demonstrates clearly the anomaly in the verdict. Reasonable men could not properly find from implication alone either in fact or in law the existence of such a complicated arrangement between the parties as would be necessary to support the verdict as rendered.

The verdict is completely inconsistent with appellee's theory of an implied joint venture between himself and Getz adopted by MGM. (JA 254.) Such an agreement if it could ever be implied in fact or in law could not have contemplated a greater liability of MGM to Byrd than the liability of Getz to Byrd. Accordingly, the verdict must be set aside as inconsistent with this theory of appellee's case or in the alternative, at the very least, appellee's recovery must be limited to the amount of the verdict against Getz alone.

E. The jury clearly erred as a matter of law in allowing plaintiff interest on the amounts recovered for the alleged breach of contract

The allowance of interest on sums recovered for a breach of contract is governed by Section 15-109 of the D.C. Code which provides for interest in a breach of contract case only if it is found "necessary to fully compensate the plaintiff."

In the instant case no evidence was offered by plaintiff to prove nor did plaintiff even allege that interest was necessary in order to fully compensate him for the alleged breach of contract. Under these circumstances the jury cannot properly allow interest and its allowance of interest against MGM (JA 33) was clearly erroneous as a matter of law and should be reversed. See National Trucking and Storage Co. v. Pennsylvania R. Co., 97 U.S. App. D.C. 52, 59-60, 228 F 2d 23, 30-31 (D.C. Cir., 1955); Shima v. Brown, 77 U.S. App. D.C. 115, 116-117, 133 F 2d 48, 49-50 (D.C. Cir., 1943), cert. den. 318 U.S. 787, 87 L ed 1154.

F. The trial court erred in failing to grant to appellants a hearing on the measure of appellee's damages herein, in the computation of the amount of the judgment and in failing to make findings of fact in support of the judgment.

The trial court entered judgment on the basis of the special verdict and without making any findings of fact as specifically required by Rule 52(a) FRCP.

The judgment as entered is computed on the gross suggested retail sales price with ^{or} _" adjustment for packaging materials, for excise tax or for the fact that Byrd participated in the music on only one side of the single record *Desafinado*. (Pltf's Ex. No. 4, JA 56, JA 178.) No adjustment was made for the recording expenses usually charged to artist's royalties. (JA 162-163.)

The foregoing errors, however small may be their dollar consequence, demonstrate the totally erroneous approach of the trial court to appellee's claim.

Conclusion

On the basis of the foregoing facts and law appellants submit that they are entitled to a reversal of the judgment of the trial court and to judgment in their favor on the ground that the court below erroneously denied their motions for summary judgment, for directed verdict, and for judgment notwithstanding the verdict. In the alternative appellants are entitled to a new trial for the errors at the trial or at the very least to a judgment limited to the amount of the judgment against Getz without interest and even the latter amount should be adjusted.

Respectfully submitted,

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BRIEF FOR APPELLEE

In the
UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,370

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 5 1958

METRO-GOLDWYN-MAYER, INC.
and
STAN GETZ

Nathan J. Paulson
CLERK

Appellants

v.

CHARLIE BYRD

Appellee

**APPEAL FROM JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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(i)

STATEMENT OF QUESTIONS PRESENTED

1. Should not this Court affirm the judgments in favor of appellee which are based on sufficient evidence of circumstances to permit the jury to conclude alternatively that there was a contract implied-in-fact or quasi-contract as to each of the appellants?
2. Should a requirement of prior approval by the American Federation of Musicians to all formal, fully drafted contracts be permitted to defeat the rights of a musical artist whose claim for damages is based on contract implied-in-fact or in the alternative on quasi-contract?



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**PREFATORY NOTE IN LIEU OF COUNTER-
STATEMENT OF THE CASE**

Appellants' Statement of the Case omits much of the significant evidence which was adduced on the trial of the case. This evidence will be cited and discussed by appellee hereinafter in the Argument, principally under Point I. An extended Counter-Statement of the Case would thus embrace needless repetition. For salutary clarification, however, the following is deemed essential:

The Parties: Appellee Byrd and appellant Getz are both eminent musical artists, Byrd a classical and jazz guitarist and Getz a saxophonist. In the crucial period here involved, 1961-1962, there was evidence that the name Charlie Byrd on record labels had greater sale value here and abroad than that of Stan Getz, who was under exclusive contract with appellant M.G.M. (JA 107). There was also evidence that M.G.M. did not consider Getz as valuable as some of its other musical artists. (JA 119) Verve Records, a division of M.G.M., was and is in the business of making and distributing records which traditionally bear the title of the recorded piece and the name or names of the featured artist or artists. Creed Taylor, during the entire period significant to this case, was head of Verve Records and had full authority to act for M.G.M. (JA 235, 236.)

SUMMARY OF ARGUMENT

Appellee Byrd presented more than adequate evidence to establish a *prima facie* case against both appellants, under implied-in-fact contract or quasi-contract. Without express agreement as to any terms there was from the beginning a general understanding between all three of the parties. This general, unexpressed understanding included the following vital matters: a recording was to be undertaken in which Byrd and Getz were to be the co-featured artists, it was to be done on the M.G.M. label, the music was to be the Bossa Nova which Byrd was to prepare and arrange, and as the circumstances developed the generalship as to the recording was lodged in Byrd. To bring off the successful recording Byrd was required to rehearse with his own employees, comprising the rhythm section, for which no extra compensation was even thought of by Byrd. Ultimately, at the successful recording, he literally ran the show, called the tunes, set the tempos, and designated who was to play what. (JA 153.)

Several things said or done by appellants supported appellee's case: (1) the album cover and liner notes prepared by M.G.M. (JA 51-53) show Byrd's co-feature status, (2) M.G.M.'s astounding admission that in effect Byrd had not been "treated fairly" or "got the short end of the stick," (3) one of M.G.M.'s own inter-office memoranda joins the names of Getz and Byrd as the featured artists with a royalty account from this Jazz-Samba recording, and (4) appellee ^{ent} Getz did not testify at the trial.

There was evidence for appellee that his name on an album had greater sale value than that of appellant Getz. Appellee's witnesses also testified that the going rate of royalties for featured artists was from 5 to 10%. Specifically, one witness testified that in the circumstances of the Jazz Samba recording, involved in this case, the "general practice" would call for an equal division of 5% royalties between Byrd and Getz.

The phonograph recording contract, Form B-4, is no bar to appellee's claim. Appellants, themselves, conceded that this form is not designed to and never does include a royalty agreement. Likewise, the defense that appellee's claim must fail because it was not based on a written contract approved by the union, must fail for several reasons. First, the suit was not based on an express, written contract. Next, the absence of a written contract was the same sort of departure from the union requirements as M.G.M.'s failure to list Getz on the form B-4, none of which could adversely affect the rights of the parties to this suit. In any event, such a technical requirement raised here by M.G.M., cannot bar appellee's claim under quasi-contract.

The trial court committed no prejudicial errors in the conduct of the trial. Its exclusion of the M.G.M.-Getz contract, based on appellants' offer of proof, was correct. As to the special verdicts, appellants can show no prejudicial error. They participated in the framing of the forms thereof, including the questions relating to

interest. Furthermore, interest allowable under the statute is particularly a recognized element of damages in cases of unjust enrichment. In the light of appellants' own proposal made at pre-trial and to the trial court, as to translation of the verdicts into dollar damages, they cannot criticize the district court's order for judgment.

ARGUMENT

I.

The Trial Court Correctly Denied Appellants' Motion for Directed Verdict and Properly Submitted the Case to the Jury.

There was adequate evidence presented to support appellee's claim for damages either under contract implied-in-fact or quasi-contract.

A. Both artists understood at the very outset, without express agreement, that they were to have equal status as co-featured artists. (JA 167, 168.) This understanding was ratified and adopted by M.G.M., again without express agreement. (Plaintiff's Ex. No. 3, JA 51-53.)

B. Appellee was the predominant actor in the piece, contributing more than both appellants in time, musical artistry, and inspired leadership, all resulting in a highly successful recording. It was he who brought the Bossa Nova music, new to this country, into the unfolding plan to make a joint recording. (JA 137, 53.) He prepared the music and did the arranging of the music. (JA 140, 219.) A recording was undertaken on October 26, 1961. (Plaintiff's Ex. No. 2, JA 50.) Appellee took the lead in rejecting and discarding this first effort at recording, as being artistically a failure. He saw immediately the reason for this, i.e., appellee's own musical group did not comprise the rhythm section. He explained this to appellants and stated to them

that "the only solution short of going to Brazil was to use my rhythm section. . . . they agreed once they heard my rhythm section." (JA 143, 144.) It was agreed among all three that Charlie Byrd was to rehearse the music material with his men in Washington, D. C., and then have Stan Getz come down for a rehearsal. All this was done. Charlie Byrd's men, this rhythm section, were his regular full time employees and these rehearsals "came under that heading" without extra compensation. (JA 144, 145.) Creed Taylor "became impatient" wanting appellee and his men to go to New York for the recording. Appellee, not then being able to leave Washington, at Mr. Taylor's request then arranged for the recording here. (JA 146.) The recording was then done on February 13, 1962. Appellee explained his function as exercised in this successful recording session:

"I literally ran the show, I called the tunes and I set the tempos and I designated who was to play what . . ." (JA 153.)

It was from this recording that the corpus of this case, the album Jazz Samba and the single record Desafinado, were made and sold under the corporate appellant's label. It was a recording hit, grossing almost two million dollars. (JA 36.)

C. There was sufficient evidence for the jury to infer a recognition by all the parties that appellee should receive royalties. The most damaging evidence against M.G.M. in this regard was the admission by Creed Taylor that in a conversation with appellee shortly after the records were known to be a hit: "It is highly likely that I said something like": "I don't think you were treated very fairly in the Jazz Samba setup or you got the short end of the stick." (JA 207.) From this dramatic admission the jury fairly could infer that Mr. Taylor, who was the sole actor for M.G.M., from the outset felt an obligation to treat appellee as a featured artist, financially as well as nominally.

This permissible inference by the jury was perhaps strengthened by a significant reference to appellee in an inter-office memorandum at M.G.M., prepared under Mr. Taylor's direction a fortnight after the successful recording, containing the names Stan Getz and Charlie Byrd. (Plaintiff's Ex. 5, JA 57.) At Creed Taylor's pre-trial deposition, after considerable struggle as to the meaning of the names therein, the following appears:

Q. "It does mean that anything due to the featured artists, anything due them as royalties there would be deducted from what would be due them, the musicians' payroll? Is that a fair statement?"

A. "I suppose so." (JA 230.)

From appellee's side, he testified that shortly after the recording, "I felt like I had been had and I just felt foolish and was embarrassed about the whole thing that I had taken such bad care of myself." (JA 167.) The jury could reasonably have concluded from this that appellee expected from the very outset to receive royalties, and later felt on reflection that he was foolish for not having insisted on a written contract. Apart from this, the jury could have inferred without any direct evidence that appellee expected to be treated financially as a featured artist is customarily treated. Orrin Keepnews, one of appellee's witnesses, testified that he is a record producer with considerable experience in the field. Following his testimony of unsuccessful efforts to shift the recording of Jazz Samba from M.G.M. to his company this evidence was adduced:

Q. "What were you prepared to pay these two recording artists, co-featured artists, if the recording were to be done on Riverside label?"

A. "You mean pay in terms of royalties?"

Q. "Royalties."

A. "Royalties, I would have done what I have always done under those circumstances, *what is the general practice*, which is to take the normal 5% artist

royalty and if possible split it evenly between the two artists." (JA 122.)

Furthermore, it should be emphasized here that appellee rendered a performance of value, albeit of a highly specialized order. It is recognized that:

"The most commonly recurring type of case in which the implication of a promise is reasonable is that in which one party has rendered a performance of value, without any return promise having been put into express language. The performance may be of any kind . . ." 3 *Corbin on Contracts* sec. 567, p. 315 (1960).

This Appellate Court recently restated the rule of reasonableness in determining the existence of implied-in-fact contract:

"In determining the existence of an implied-in-fact contract, however, the conduct of the parties is to be viewed as a reasonable man would view it in all the circumstances." *Roebling v. Dillon*, 109 U.S. App. D.C. 402, 404, 288 F.2d 386 (1961).

This same rule applies to a joint venture which is undertaken without formal agreements, since a joint venture "may be inferred from the conduct of the parties without express agreement." *Libby v. L.J. Corporation*, 101 U.S. App. D.C. 87, 90, 247 F.2d 78 (1957).

D. *In the alternative, the jury's verdicts for appellee were proper under the equitable principles of quasi-contract or unjust enrichment.*

It is respectfully suggested that the circumstances above set forth in A, B, and C establish the validity of this point. And yet there is more.

The most important witness for appellants was not produced to testify. This was appellant Stan Getz. It reasonably may be suggested

that acquiescence in appellee's claim alone sealed his lips. On the other hand, Getz' absence from the trial might well have been calculated to save embarrassment to both appellants.

If Mr. Getz had testified both appellants must have known that he would have been confronted, among other things, with a damaging statement in his deposition (which was called to the attention of the district court in opposition to appellants' motion for summary judgment):

"... Creed Taylor said to me to help sell the album or as a nice gesture to put Charlie Byrd's name on the cover.

Q. You mean that came from Creed Taylor?

A. I think the part of it that came from Creed Taylor is that maybe it will help sell the record."

(Getz dep'n p. 16) (JA 21.)

The direct admission of M.G.M. exhibiting a manifestation of a realization of its shabby treatment of appellee has already been referred to above. This is the "short end of the stick" aspect. Appellants now seek to turn the "stick" around and use it to their advantage. They cite (Appellants' brief pp. 38, 39) appellee Byrd's testimony as to Creed Taylor's statement "that Byrd had gotten the short end of the stick. (JA 155.)". They argue that "This is not in any sense an admission by Taylor that Byrd was entitled to any more than the short end of the stick." This suggested nuance of meaning is shattered when examined beside the substantial acknowledgment by Creed Taylor himself that the sense of the expression was that Byrd was not treated fairly. (JA 207.)

Finally, the jury was informed of appellants' concession that they know of no other instance wherein one of two co-featured artists, who were starred, billed, and advertised with equal prominence, received no royalties. (JA 29, 94.)

In a review of the legal correctness of the trial judge's submission of the case on the alternate ground of quasi-contract, the broad sweep of this doctrine must be considered. "Quasi contractual obligations are imposed by the law for the purpose of bringing about justice without reference to the intention of the parties." 1 *Williston, Contracts* sec. 3A, p. 13 (Jaeger ed. 1957).

II.

Neither the Phonograph Recording Contract nor the American Federation of Musicians Agreement Constituted a Bar to Appellee's Claim.

A. *The Phonograph Recording Contract.* (Plaintiff's Ex. No. 1, JA 49.) This document, sometimes referred to as Form B-4, is designed by the A. F. of M. for use at all phonograph recording sessions. It serves as a record of information for the musicians' union covering such things as place, time, member musicians participating in the recording, their wages for the job, and their pension contributions. *It is not designed to, nor does it ever, embrace or deal with royalty agreements.* (JA 123, 157.) It later was stipulated to the jury that this "American Federation of Musicians Form B-4, in no way is designed to include any royalty agreement." (JA 236; and see JA 184.)

In the light of this evidence and the stipulation it is difficult to understand the argument I. A in appellants' brief, pp. 20-24. The basic invalidity of appellants' contention is in the simple definition of an integrated contract. The separate rights and obligations between a recording company and *featured artist* are always something entirely separate and apart from this document.

It would appear that appellants are in this Court again arguing an evidentiary point as it did unsuccessfully to the jury. The many distinguished but inapplicable authorities cited may add luster; but

they cannot alter the fact that the jury chose not to believe that appellee either did not expect or should not be expected to receive a leader's wage as his sole compensation, simply on the basis of the

~~-----~~ FORM B-4

B. *The American Federation of Musicians Agreement* (JA 59-87). Appellants' brief (p. 25) quotes paragraph 13 of this agreement which is central to their argument. This provision obviously contemplates an express, typewritten agreement between the record producer and member of the union. It cannot apply to a contract implied-in-fact. There appears to be no disagreement on this in view of the statement by appellants' counsel to the trial judge. (JA 184-185.)

M.G.M.'s position simply but erroneously is that there can be no enforceable legal rights flowing from a royalty contract implied-in-fact, because the union agreement has effectively closed the door on such rights. There are several answers to this.

First, there is nothing so sacrosanct touching this agreement that it should be held to defeat the rights of a union member under a fully executed implied-in-fact contract. The fruits of his labor are here at stake. Certainly his union who negotiated the agreement for his benefit hardly intended such a harsh result.

Next, appellant M.G.M. here takes an inordinately technical position with embarrassing overtones. On the one hand it asserts paragraph 13 to defeat appellee's right, and on the other it ignores its substantive obligation to the union in these very circumstances. The form B-4 contract (Plaintiff's Ex. No. 1, JA 49), covering the successful recording of Byrd and Getz on February 13, 1962, does not list Getz as a participating union member. Inclusion of his name was required by paragraph 13 of the union agreement.¹

¹ The same requirement also appears in paragraph 3 of appellants' contract. (Defendants' Ex. No. 3 for identification) (JA 88). The form B-4 contract covering the unsuccessful recording (Plaintiff's Ex. No. 2) (JA 50) includes Getz' name.

There is no suggestion by appellee that appellants sought by this omission to avoid their obligation to the union with respect to its retirement fund, although this probably was the unintended result. The point is that here is another manifestation of the laxness of all the parties with respect to the technical requirements of the union. The substantive rights and obligations of appellee vis-a-vis appellants were not affected thereby.

The weakness of M.G.M.'s position can be demonstrated further by projecting the supposititious case of an express oral agreement covering royalties. If a record company through a qualified employee had orally promised an artist royalties, it is suggested that it would not have the temerity to advance the union contract as a bar to its express obligation with the artist. Such a position legally would obviously be unsupportable in the case of a fully executed oral agreement.

Finally, it should be observed that M.G.M. alone, not Getz, asserts the labor agreement as a defense, and that this point relates solely to the implied-in-fact contract. Even if M.G.M. had a valid point here, appellee can still find haven under quasi-contract. In *Matarese v. Moore-McCormack Lines*, 158 F.2d 631, 634 (C.A. 2, 1946), recovery was permitted in quasi-contract when an express contract failed for lack of an agent's authority. It is respectfully suggested that by analogy appellee here is entitled to equal consideration and protection.

III.

Appellants Are Not Entitled to a New Trial**A. *The American Federation of Musicians Agreement and the Getz-M.G.M. Contract Were Inadmissible.***

The question of the legal relevance of the labor agreement (Defendants' Ex. No. 1 for identification, JA 58) has already been discussed above extensively. If appellee is correct in the point that this agreement does not constitute a bar to his claim, then the agreement had no evidentiary relevance or competence. This is implicit in the ruling excluding the proffered exhibit.

The exclusion of the contract between M.G.M. and Getz (Defendants' Ex. No. 3 for identification, JA 88) was likewise correct. Appellants' quite articulate offer of proof was to show by the complicated provisions of the instrument the unlikelihood of an implied contract in all the circumstances of this case. (JA 212.) The tendered exhibit, however, was an exclusive, artist contract, extending over a long period of time with renewal options. Its very complicated character was far different from the few simple provisions needed for inclusion in a written royalty agreement concerned only with one recording.

Certainly it cannot be said that the trial judge abused his discretion in sustaining appellee's objection to the admission of this document. And yet appellants truly were not fully frustrated. Without hindrance they cross-examined appellee at length and appellee's witness Bialek to a lesser extent as to the terms, limitations, and conditions which are standard in exclusive contracts of the type proffered and excluded. (JA 159-165, 109-110.)

B. *The Jury Verdicts and the Judgments Rendered Thereon Are Unassailable.*

1. The Verdicts. (JA 33-34.) It must be said that the subject of submitting to the jury the questions for special verdicts was a *mat-*ter entailing considerable time and discussion by trial court and counsel. Appellants so far from objecting, actually participated in the process of the drafting of these questions. (JA 279-281.) There was nothing in the court's instructions, in the verdict forms submitted to the jury, in appellee's theory of the case, in the law, or in the evidence, which required uniform verdicts as to liability or division of royalties.

One likely explanation, if indeed an explanation is needed, for the variance in the jury's special verdicts is to be found in the evidence. For example, for appellee there was evidence concerning usual rate of royalties of 5% to 10% of total sales, with no qualification as to 90% of sales nor as to any further deductions. (JA 108.) Appellee presented the further evidence that in the very circumstances of this case the applicable going rate of royalties would be an equal division of 5% for both artists, again without any reference to 90% of sales and deductions. (JA 122.) As against this, there was extensive evidence from which the jury could deduce that in the type of long term artist's contract binding Getz, his net of royalties from the recordings here involved was somewhat less than a full 5%. (JA 160-164.) The jury was actually told this, by stipulation. (JA 240.) From this the jury fairly could have found the obligation to Byrd owing from M.G.M. greater than that to Byrd owing from Getz.

Equally significant to the jury undoubtedly were the overtones sounding throughout the trial from the unity of defense of appellants. Both appellants were represented by one counsel. The jury heard nothing as to a cross-claim by M.G.M. against Getz for contingent responsibility in contribution or indemnity. Consequently, the jury obviously was justified in concluding that Getz received 5% of 90% of retail sales as royalties, with certain deductions, and would never have to return any part of these royalties to M.G.M. Since appellee

was seeking only a full 2½% plus interest as royalties, in the minds of the jurors this could never equal the receipts by Getz. This probably explains the note sent to the court by the jury asking if it could return a verdict in excess of 2½% against M.G.M. (JA 312.) The manifest equity of the verdicts is reflected furthermore by the interest factor as against M.G.M. and its absence as against Getz. Here again there is a clear indication that the jury was seeking to equalize as far as it could compensation to both the co-featured artists.

2. The Interest. Appellants' present position with respect to the interest factor is untenable. They not only did not object to the trial judge's disposition of their specific instruction on interest, but agreed that this subject more properly was largely one for argument to the jury.² (JA 279, 280.) Furthermore, they participated in and unequivocally assented to the form of special verdicts which included spaces for interest. (JA 281.) "Since the question of interest was submitted to the jury on an agreed instruction, appellant cannot now object to the submission;" *Tendler v. Jaffe*, 92 U.S. App. D.C. 2, 6, 203 F.2d 14 (1952).

Neither of the cases cited by appellants in their brief under the point involving interest is controlling, because in one there was no acquiescence in jury instruction and form of special verdict, and in the other a different statute covering interest was involved. It should be noted that appellee's claim for interest as part of the damages sought, was asserted from the very outset in the amended complaint (JA 4, 5) and in the pre-trial proceedings. (JA 27.) In both, the interest was demanded from the date of the first accounting by M.G.M. to Getz, on August 15, 1962.

²It should be noted also that following the charge to the jury, appellants expressed content therewith. (JA 310)

Substantively, the statute here involved, Section 15-109 of the D.C. Code, lends itself particularly to appellee's alternative claim of quasi-contract or unjust enrichment. In *Mitchell v. Riegel Textile, Inc.*, 104 U.S. App. D.C. 139, 141, 259 F.2d 954 (1958), which was a suit under the Walsh-Healey Act for underpayment of wages, this Court said: "As soon as the underpayments were made, unjust enrichment was complete. Interest should therefore be allowed from the dates of the underpayments."

3. The Judgments. At the threshold of the trial of this case appellants explained their reason for limiting the trial to the question of liability. This was their anxiety that the jury should not hear "dollar amount." They then made clear that at appellee's election, if the trial were to result in his favor, the figures which had already been submitted to him (Defendants' Statement, etc. JA 30-32), would be used "for determining the amount of actual liability on the basis of the jury's finding of liability and rate of royalty that plaintiff is entitled to." (JA 92.) Likewise, in appellants' pre-trial statement they had earlier proposed the very same course. (Appendix-A, at end of this brief.)

How now then can appellants fairly claim that the trial court was obligated to make special findings of fact? In the positure of the case between verdicts and judgment there was nothing further to be done, except mathematically to translate the verdicts into dollar amounts. This was done. Appellants received a copy of the proposed judgments before hearing thereon. They did not, nor do they now, question the accuracy of the accountants' figures, attached to the order of judgments (JA 35-39), computed on the basis of appellants' own figures. (Defendants' Statement, etc. JA 30-32.)

CONCLUSION

This case was fully and fairly tried on the clear-cut issues arising out of appellee's claim for royalties based on implied-in-fact contract or in the alternative on quasi-contract. The trial judge conscientiously and without prejudicial error ruled on the many legal questions presented, and submitted the case to the jury for determination under a charge and special verdicts, all quite fair and comprehensive. The verdicts themselves testify to a logical and equitable result.

It is therefore respectfully urged that appellee is entitled to have the judgments of the district court affirmed by this Honorable Court.

Respectfully submitted,

James B. Goding
Counsel for Appellee

APPENDIX A

Excerpt from Appellants' Pre-Trial Statement:

"Request for Stipulations.

....

If plaintiff is successful on the issue of liability, defendant MGM will produce a sworn statement of total sales of the recordings in issue sold by them and the suggested retail prices thereof, together with a sworn statement of all royalties paid by defendant MGM to defendant Getz with respect thereto. If plaintiff is not satisfied with such statement defendant MGM will give plaintiff, his counsel and his own auditor the opportunity to make any audit they may desire of such statements. If the parties cannot then agree on the accuracy of said statements the case shall proceed to a trial of said accounting issue."

REPLY BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21370

MFTRO-GOLDWYN-MAYER, INC.
and
STAN GETZ

Appellants

v.

CHARLIE BYRD

Appellee

APPEAL FROM JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 20 1968

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21370

METRO-GOLDWYN-MAYER, INC.
and
STAN GETZ

Appellants

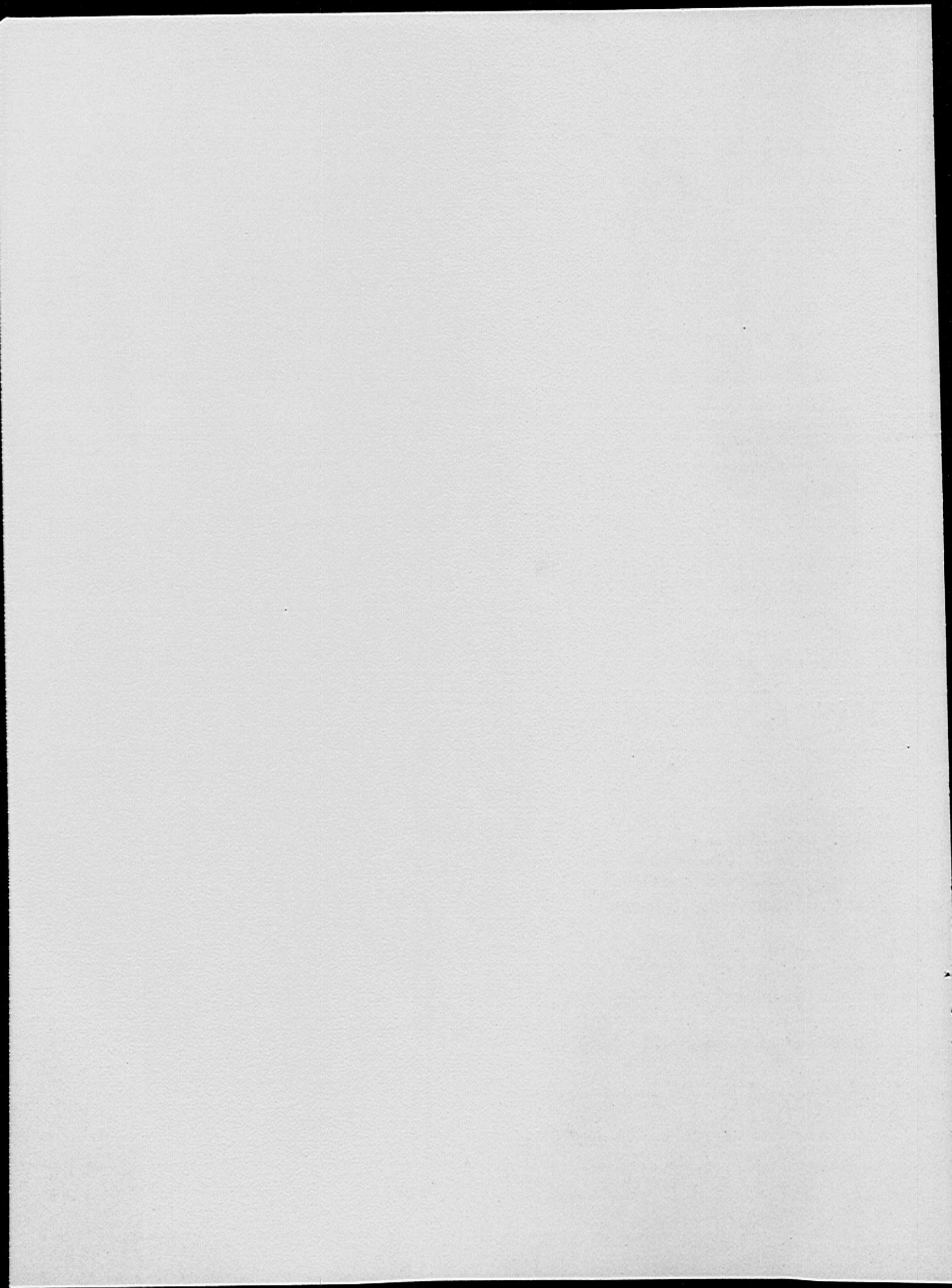
v.

CHARLIE BYRD

Appellee

APPEAL FROM JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS



Statement

The tenuous basis upon which appellee's case is founded is clearly demonstrated by his brief herein. His legal propositions are unsupported by authority pertinent to the issues here presented, and his factual conclusions are based upon patent stretching of the record and inferences piled upon supposition. A complete reply to all the erroneous statements in appellee's brief would require an unduly lengthy reply brief. Only the more significant will be discussed.

Argument

I. As a Matter of Law There Can Be No Contract Implied-in-Fact or Quasi-Contract for the Payment of Any Royalties to Appellee on Sales of the Phonograph Records Here in Issue.

Appellee misunderstands appellants' argument with respect to the existing relationships between the parties and the impossibility of an implied-in-fact contract or quasi-contract in the face of such relationships. His argument, therefore, totally fails to meet the position of appellants. The American Federation of Musicians Phonograph Record Labor Agreement and the contract between Stan Getz and MGM (Defts' Exhibits Nos. 1 and 3 for identification,

JA 58, 88), establish express prior existing legal relationships between the parties here involved with respect to the services here involved.

The contract on AF of M Form B-4 (Pltf's Exhibit No. 1, JA 49) was executed by appellee and appellant MGM pursuant to the Labor Agreement. The undisputed authorities cited in appellants' opening brief (appellants' brief, pp. 21-23) establish that where such express contracts exist there cannot be an implied-in-fact or quasi-contract. Appellee correctly states that a B-4 agreement does not preclude a separate royalty agreement. It is appellants' position, however, that under the undisputed law cited in appellants' brief and the express provisions of the Labor Agreement (para. 13, JA 66) any such separate agreement must be express.

The Phonograph Record Labor Agreement has nothing more "sacrosanct" (page 10 of appellee's brief) about it than the mutuality of any binding contract. As a part of the mutual considerations including provision for a scale of minimum compensation for recording services, it was agreed that no other agreement between recording companies and union members would become effective until approved by the union. (JA 66.)

Appellants do not say, as appellee seems to believe, that the alleged implied contract is unenforceable because it was not approved.

Rather, it is appellants' position that because of the Labor Agreement requirement for prior approval there can not be any contract implied either in fact or in law since no such implied contract could possibly have the required prior approval. Furthermore, as a matter of general contract law the requirement of prior approval is at least a condition precedent to the formulation of a valid contract.^{1/} Appellee never answers, as he obviously can not, appellants' contention that both as a matter of labor law and of general contract law (appellants' brief, pp. 25-31) Byrd was not free to negotiate or enter into a binding contract in violation of the union-MGM agreement and without obtaining prior union approval.

Commencing at the bottom of page 10 of his brief appellee makes a completely unwarranted assumption from the record. He points to the fact that the particular B-4 contract of February 13, 1962 which he introduced as his Exhibit No. 1 (JA 49) does not list the name of Stan Getz. From this fact he develops the amazing charge that MGM neglected its obligation to the American Federation of Musicians to make a payment to the union retirement fund; and from this bold assumption he jumps to the further assumption that there existed a "laxness of all parties with respect to the technical requirements of the union."

^{1/} It is significant that Getz' royalty agreement includes the required statement that it is not effective until approved by the union. (JA 89.)

In the first place there is no basis whatsoever for appellee's gratuitous assumption that appellant MGM could report its obligation to make a payment to the union retirement fund with respect to the services of Stan Getz only on this particular Form B-4 contract that reports the services of Charlie Byrd as leader and the services of his personal musical group. Byrd was the regular leader of this group. (See JA 143, 144.) This B-4 contract form is addressed to Union Local 161, Byrd's Local. Getz was affiliated with Local 804. (See Pltf's Exhibit No. 2, JA 50.)

The absence of Getz' name from this particular B-4 contract is evidence in favor of appellants that Byrd was definitely not employed as the leader of Getz and that Byrd was well aware of this fact at the time of the recording.

Attention is also invited to the provisions of Exhibit B of the Phonograph Record Labor Agreement which provide for quarterly or semi-annual payments to the pension fund, reports by the Company in such form as the trustees of the fund may reasonably require and audits of the Company's records by the trustees. (JA 86, 87.) How can appellee assume, without any evidence of record whatsoever, that these important provisions have been violated by appellant MGM and then argue that this assumption is an example of a laxness

by all parties concerned in connection with union requirements?

Appellee argues in his final paragraph under his Point II that appellants' argument based upon paragraph 13 of the Labor Agreement is related to MGM "alone" and "solely" to the implied-in-fact contract alternate position of appellee. To the contrary, the Labor Agreement and the B-4 contracts, ^{2/} clearly establish that Getz and Byrd were both union members and were employed as such by MGM. In the light of this union employer-union employee relationship there was no room for the implied joint venture between Byrd and Getz, which is alleged to exist, and there is no room for any implied-in-fact or implied-in-law contract between the parties. It is the implication of a contract which is impossible. No distinction can be made in this regard between implied-in-fact and implied-in-law contracts. Furthermore, appellee is attempting to alter the terms of the express written contract between MGM and Getz. This he cannot do by implication alone. His position becomes even more ridiculous in the light of the fact that he is not even a party to this latter express contract.

^{2/} Attention is invited to the Form B-4 contract for the unsuccessful recording session in October 1961. (Pltf's Exhibit No. 2, JA 50.) A line appears to have been drawn through the name of Stan Getz in the first line of the list of employees' names. A copy without the line was submitted at the trial for the copy with the line, and this exhibit as included in the official record does not contain this line. (JA 261.)

II. On All of the Facts of Record, Appellee Was Not Entitled to go to the Jury and Appellants Are Entitled to Judgment in Their Favor Notwithstanding the Verdict

Appellee argues that there was adequate evidence to support his claim for damages either under contract implied-in-fact or quasi-contract. Appellee does not attempt to establish any of the generally accepted basic requirements for a joint venture, an implied-in-fact contract or a quasi-contract. (See appellants' brief, pp. 32, 35, 38.) Instead appellee presents a few isolated facts and from these draws wholly illogical and unsupported conclusions. These isolated facts and unsupported conclusions represent the sum total of the evidence which appellee claims supports the verdict below. These facts, even if supported in the record, are, on their face, insufficient to sustain the jury. Appellants will not here reiterate the substantial facts established in the record which conflict with and refute the jury findings (see appellants' brief, pp. 31-44) but shall instead examine each of appellee's four propositions (lettered A through D in his point I) and demonstrate how each is unsupported in the record and clearly erroneous.

A. Appellee argues that he and Stan Getz were to have "equal status" as co-featured artists (citing JA 167, 168). The phrase

"equal status" is the first strand in a flimsy web of suppositions relied upon by appellee to support his case. These words do not appear in the cited pages of the record nor at any other place. The cited pages of the record contain direct testimony of appellee with respect to a tacit understanding that his name would be co-featured with the name of Stan Getz. There is no testimony of any conditions attached to the joint use of the names of the recording artists and their names were used without any conditions. (Pltf's Exhibit No. 3, JA 51-53.) Appellee testified that he was pleased to have his name appear in public and that he received benefits therefrom. (JA 168, 169.) There is nothing anywhere in the record to suggest that appellee was displeased with the fact that the name of Stan Getz was used ahead of his name.

Appellee does not attempt to explain how this equal but after use of his name on the record album and on the record label establishes for him some special kind of "status".

B. Appellee's second proposition makes the totally gratuitous statement that appellee was "the predominant actor in the piece, contributing more than both appellants in time, musical artistry, and inspired leadership." Nothing in the following statements or in the record citations supports these statements. They can be excused only

on the basis of the natural pride appellee's counsel must feel toward his talented and locally popular client.

Appellee's recitation of the time table of events leading up to the successful recording session on February 13, 1962 contains no comparison of the "time", "musical artistry", or "leadership", whether inspired or not, contributed by the respective parties in these events. Byrd did act as leader at the recording session, he did all the things a leader is supposed to do, such as calling the tunes, setting the tempos, and designating who was to play what. (JA 153.) He was specifically employed by MGM as a leader for this purpose, as is evidenced by Pltf's Exhibit No. 1 (JA 49), and he was paid double union scale for his services as leader as required by the Phonograph Record Labor Agreement. (Defts' Exhibit No. 3 for identification; JA 58, 74.)

The inadequacy of the evidence with respect to any significant work by appellee in any arranging of the music is discussed in appellants brief at pages 42-43.

Appellee's final sentence under heading B (page 5 of his brief) is a gross misstatement of the record that can not, in appellants' opinion, be excused. If appellee intended to imply that appellant MGM grossed almost two million dollars on the recording in issue

he is guilty of a deliberate misrepresentation of the record. There is no evidence whatsoever anywhere in the record with respect to what MGM may have received on its sales of the records in issue. The authority cited for the alleged amount of gross sales of the record is Joint Appendix, page 36, at which point there appears the computations made by appellee's accountant attached to the judgment of the trial court. These computations have no basis in the record except Defendants' Statement Pursuant to Order of Pre-trial Examiner Dated April 11, 1967. (JA 30-32.) This statement sets forth the unit sales of the records in issue and the "suggested retail list price" for each of the records. There is no evidence that the records were sold by any retail store at the "suggested retail list price." Appellee introduced no evidence of actual retail selling prices. The only evidence relating to retailing practices in the sale of records is the testimony that appellee's witness, Robert Bialek, is president of the corporation operating Discount Record Shop and Discount Book Shop. (JA 95.) It is submitted that this Court can take judicial notice of the regular retailing practice of selling below "suggested list price" and of the regular newspaper advertisements of the retail sale of records at prices substantially below suggested list price. Cf. Meyerson v. Hurlburt, 68 App. D.C. 360, 98 F 2d 232 (1938), cert den. 305 U.S.

C. Under proposition C, appellee recognizes that the jury could find in his favor only through an inference. As the basis for this inference he relies principally upon the frank acknowledgment by Creed Taylor that he had said to appellee after the record appeared to be a success that appellee "had got the short end of the stick." (JA 155, 207.) The significance of this conversation is discussed at pages 38 and 39 in appellants' brief. The important part of this conversation was that it recognized that Byrd was not receiving royalties and that Byrd made no demand or request to be paid royalties. (JA 165-167.)

There is no reason why the jury should have been asked to "infer" a recognition by all parties that appellee should receive royalties, or to "conclude" what appellee himself had thought or expected from the outset. Appellee was able to testify positively to a tacit understanding that his name would be co-featured with Stan Getz on the records. (JA 167, 168.) If a similar tacit understanding existed with respect to royalties he could have given similar testimony. He did not even testify that at any time before the making of the record had been completed and its success was assured he had expected or wanted royalties. This was his burden and he failed to offer any such testimony.

Appellee places great reliance on his Exhibit No. 5 (JA 57). A careful examination of this document and all the testimony relating to it (JA 228-234) affords no support to appellee.

The testimony quoted from appellee's witness, Orrin Keepnews, commencing at page 6 of appellee's brief, is no help to appellee. His concentration on the words "general practice" seems to have caused him to overlook the words "if possible" indicating that the terms of an agreement for the splitting of royalties between two artists have to be negotiated and therefore cannot be implied or inferred.

Appellee's reliance on the case of Roebling v. Dillon, 109 U.S. App. D.C. 402, 288 F.2d 386 (1961) is surprising in that this Court there held against the claim of the plaintiff based upon implied-in-fact contract and denied recovery on quasi-contract because the defendant's enrichment was not unjust.

The case of Libby v. L. J. Corporation, 101 U.S. App. D.C. 87, 247 F.2d 78 (1957), cited by appellee is inapplicable to the facts of this case where a tripartite joint venture can be inferred only as a variation of the terms of the express written contract between Getz and MGM and the express provisions of the Labor Agreement applied to all the parties. (Appellants' Exhibits Nos. 1 and 3 for identification, JA 58, 88.) It is the height of absurdity to suggest, as appellee does,

that from the complex express contractual arrangements existing between the parties here involved as evidenced by the union-MGM agreement (JA 58-87) and by the royalty contract between MGM and Getz (JA 88-90) an implied joint venture can be fabricated which conflicts with or ignores the provisions of those express contracts.

D. Appellee's proposition D attempts to support the jury verdict on the ground of quasi-contract or unjust enrichment. Yet appellee fails to make any effort to discuss the authorities cited by appellants that there can be no implied-in-fact or quasi-contract in the face of an existing express relationship between the parties. He discusses again the "short end of the stick" testimony as a manifestation of "shabby treatment" of appellee. If the parties had thought that appellee were entitled to royalties words of this nature would be inappropriate. There would have existed only a simple unpaid debt due from a solvent debtor. Appellee's own words disprove his case.

Appellee again overstates his case in commenting on the absence of Getz from the trial. The failure of Getz to testify does not fill the gaping holes in the affirmative proof required of appellee in seeking to establish a contract implied-in-fact or in the alternative a quasi-contract.

III. Alternatively, Appellants Are Entitled to a New Trial for Errors in the Trial

As stated in their brief, appellants are seeking reversal and judgment in their favor on the ground that they were entitled to a directed verdict on their motions below made at the close of appellee's case and renewed at the close of all the evidence. If they are not entitled to judgment they are at least entitled to a new trial.

A. The relevance and materiality of the Phonograph Record Labor Agreement and of the contract between Getz and MGM (Appellants' Exhibits 1 and 3 for identification, JA 58, 88) are clearly demonstrated by the argument which has developed under Point II of appellee's brief, discussed above, in addition to the arguments made in appellants' initial brief herein.

B. Appellants reassert their position that the special verdicts are inconsistent and require reversal for a new trial. If the jury agreed with the principally asserted theory of appellee's case that there existed by implication a joint venture between Byrd and Getz which was adopted by implication by MGM (JA 254) the verdicts and judgments obviously should have been entered against each appellant in the same amount. If the jury did not agree with this theory then there is no logical basis on which the same performance by Byrd could possibly entitle him to

recover from both Getz and MGM. In this latter event his recovery would have to be based either on an implied contract for royalties to be paid by MGM or on an implied assignment to Byrd by Getz of a part of the royalties otherwise due to him from MGM but not both. ^{3/}

The special verdict was in terms of percent of "sales" as to MGM. The only evidence of "sales" before the jury was with respect to unit sales of records. (JA 237-239.) Judgment for dollar amounts computed from these unit sales by appellee's accountant (JA 36-39) was entered without any further hearing. Appellants fully expected such a hearing, in the absence of agreement, to determine the dollar amount of "sales". The only evidence from which these dollar amounts could be computed is based on Defendants' Statement Pursuant to Order of Pretrial Examiner (JA 30-32). This statement shows the "suggested retail list price" of the records and deductions therefrom for "jacket" and "excise".

The entering of judgment without agreement or hearing to determine the meaning of "retail sales" and without findings of fact thereon was clear error entitling appellants to a new trial on this issue.

3/ If an express agreement for the assignment to Byrd by Getz of a fractional interest in the royalties due from MGM under the express Getz-MGM contract could have been proved by Byrd, MGM might have been made liable to Byrd for such payments by notice of the assignment. There was absolutely no evidence presented of any such notice until the filing of the amended complaint herein. If notice of assignment had been given, the liability of MGM could not exceed that of Getz.

It further demonstrates the approach of appellee and of the trial court to the case, putting other rulings and actions in their true perspective and demonstrating that to provide simple justice to appellants this Court should at least grant a new trial on all issues.

On the issue of interest, appellee makes another of his erroneous statements with respect to the record in asserting that counsel for appellants agreed to the submission of the interest question. In this instance it may be oversight as the references he gives are correct so far as they go (JA 279, 280), but he overlooks the fact that counsel for appellants at a later point in the record renewed his objections to the handling of the interest question and moved specifically for a directed verdict thereon because of the failure of any proof whatsoever of damages from the withholding of the money claimed to be due. The trial judge advised appellants that they were protected on the record on this issue. (JA 282.) With respect to appellee's footnote reference (page 14 of his brief) to appellants' expression of "content" with the charge to the jury, the record shows that counsel for appellants was responding to the trial judge's question whether appellants had any objections "other than those you have already made." Appellee's counsel may have overlooked these words in the transcript of the proceedings, although they are on the same page cited in his footnote (JA 310).

Since under Section 15-109 of the D. C. Code interest must be based on damages from the withholding of the money due, the allowance of interest against MGM was clearly inconsistent with the failure to allow interest against Getz.

Nothing more need be added to this point to the argument with respect to the interest issue made in appellants' original brief. Appellee fails to distinguish the cases cited by appellants on the issue. The case of Mitchell v. Riegel Textile Inc., 104 U.S. App. D.C. 139, 141, 259 F. 2d 954 (1958) cited by appellee is completely inapplicable to this case. That suit was brought to set aside minimum wages prescribed under the Walsh-Healey Act for employees in a large number of textile mills none of which appears to have been located in the District of Columbia. The D. C. Code provisions with respect to interest, therefore, had no application to the amounts of underpaid wages of the employees of these mills.

Conclusion

In light of the foregoing it is submitted that appellee's brief fails to provide any answer to appellant's original brief and fails to support the verdict or judgment entered below.

It is respectfully submitted, therefore, that appellants are entitled to reversal of the judgment below and to judgment in their favor or in the alternative to a new trial.

Respectfully submitted,

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